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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1906.

No. 217.

THOMAS TINDLE, et al, PLAINTIFFS IN ERROR,

vs.

CLARENCE T. BIRKETT, DEFENDANT IN ERROR.

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SUPREME COURT OF THE UNITED STATES.

October Term, 1906. No. 217.

THOMAS TINDLE, et al, Plaintiffs in Error,

vs.

CLARENCE T. BIRKETT, Defendant in Error.

ABSTRACT.

This action was brought in the Supreme Court of the State of New York and was twice tried therein.

The judgment of non-suit upon the first trial was reversed by the Court of Appeals of that State (171 N. Y. 520) and a new trial ordered. The second trial resulted in a judgment in favor of the plaintiffs therein, the plaintiffs in Error herein, and against the defendant in Error. Upon appeal to the Court of Appeals from that judgment the case was reversed a second time and judgment rendered dismissing the complaint upon the merits solely upon the ground that each and all of the several causes of action sued upon were released by a discharge in bankruptcy granted the defendant by the United States District Court for the Northern District of New York prior to the time of the commencement of the action.

Upon the remittitur from the Court of Appeals the Supreme Court of New York thus rendered and entered final judgment as directed. The plaintiffs thereupon sued out this writ of Error to that Court.

The complaint contains three counts. Each sets out a cause of action for damages for fraud and deceit alleged to have been practiced upon the plaintiffs in Er-

ror by the Defendant in Error on behalf of a co-partnership firm of which he is the sole survivor. (Page 1).

The answer denies the fraud and pleads the discharge in bankruptcy as an affirmative defense to each cause of action. (page 4). The trial court decided all questions in favor of the plaintiffs in Error. (page 6) The Court of Appeals left the decision of the trial court undisturbed upon the question of fraud. (Pages 39 and 40)

It dealt fully with that subject upon the first appeal where that was the only question in the record in the following forcible language:

"That the statements were grossly false and that the plaintiffs relied" upon them "are facts concerning which there is and can be no serious dispute. * * *" (171 N. Y. 523). The decision of the trial court may be found at page 6 of record.

SPECIFICATION OF ERRORS.

There is but one Error in the record which raises a Federal question. The Court of Appeals and the State Supreme Court in obedience to its mandate decided that each of the causes of action alleged in the complaint were released by a discharge in bankruptcy granted to the defendant in Error by the United States District Court for the Northern District of New York prior to the time of the commencement of the action and dismissed the complaint solely for that reason, whereas the dicision ought to have been that said discharge in bankruptcy did not release any of said causes of action. (Page 46)

BRIEF.

The only question for this court to consider is that of the effect of the discharge in bankruptcy. This involves a construction of sections 63 (a) and 17 of the bankruptcy act of 1898. The two sections read as follows:

"Sec. 17. A discharge in bankruptcy shall release the bankrupt from all of his provable debts, except such as * * * (2) are judgments in actions for frauds or obtaining property by false pretenses, or false representations or for wilful and malicious injuries to the person or property of another * * * or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

"Sec. 63. Debts which may be proved:

(a). Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not * * * (4) founded upon an open account or upon a contract, express or implied, and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge."

We are not concerned with section 63 (b) because the claims in question are all liquidated. If they were unliquidated but otherwise provable section 63 (b) prescribes the practice.

This court discussed these sections at some length in the case of Crawford vs. Burke, 195 U. S. 176.

The court of Appeals decided that thereby it had finally decided all questions involved.

Tindle vs. Birkett, 183 N. Y. 267. (Opinion may be found in record at page 40).

Notwithstanding all of this we have brought this case into this Court and respectfully ask its careful consideration for the following reasons:

1. Because this case is not within the principle involved in Crawford vs. Burke as the Court of Appeals decided it to be, but on the contrary that case clearly shows the way by which this one can be distinguished and a contrary and more just disposal made of it.

2. Because Crawford vs Burke when it construes section 17, subdivision 4, lays down a most unjust rule and almost every proposition there stated can be explained in such a way as to convince one of a contrary intent in congress from that ascribed. This involves simply a comparison of the new statute with the old as interpreted by contemporary courts.

Those decisions, thirty years dormant and useless, were not brought to the attention of this court when it decided the Crawford case; otherwise that decision must of necessity have been different. This alone would be enough to lead us to ask the Court to reexamine the question to see if an error had not been made.

It is important to the business community because large numbers of people who have been defrauded by such rascality as is here involved find themselves not only robbed of their property but also find that those

who robbed them are opulent in the open, notorious possession of it; And under an interpretation of that case, which is quite common, perfectly secure into the bargain. It is hard to believe that Congress ever intended to make that possible or that this court would construe a doubtful statute so as to give that effect if it could be avoided. The Court plainly saw this injustice. It said in the opinion at page 191, "Why an ordinary claim for fraud should be released by the discharge while a judgment for fraud is not released, is not altogether clear, &c."

With these preliminary remarks we invite the attention of the court to the specific points which we wish considered.

POINT I.

Section 17 of the Act provides that none but provable debts are released by a discharge. These debts are not provable debts and therefore are not released within the principles laid down in the second proposition of Crawford vs. Burke (page 193 of opinion).

That case is authority for the proposition that a debt "founded upon an open account or upon a contract, express or implied" is released regardless of the form of action in which the plaintiff may sue. (End of page 193 of opinion). It is summed up by these sentences "It certainly could not have been the intention of Congress to extend the operation of the discharge under section 17 to debts that were not provable under section 63a. It results from the construction we have given the later section that all debts originating upon an account, or upon a contract, express or implied, are provable though the plaintiff elects to bring his action for fraud." The court continualy uses the expression "or-

iginates or is founded upon an open acount or upon a contract." "Founded upon" must be equivalent in meaning to "originates" both in common sense and from the way the expressions are thus continually used. IT GOES WITHOUT SAYING THEREFORE THAT A CLAIM FOR FRAUD IS NOT RELEASED UNLESS IT DOES SO ORIGINATE. There is nothing in section 63a within which it could be classified unless it can be traced back to a contract origin or foundation.

The debt under consideration in Crawford vs. Burke clearly had its origin, its foundation in a valid contract. That determined its character. It was a case where a broker who had for some time carried an account with his customer, bought and sold stocks for him upon margins, suddenly converted his customer's property to his own use. He accomplished his purpose and stilled his customer's suspicions for a time by false reports of his transactions. Nevertheless at the beginning, at the origin, at the foundation, there was simply a contract relation between the parties entirely free from any fraud. The fraudulent acts were committed during the performance of the contract, not before it began. The fraud was not the origin. It arose through a failure to carry out a lawful contract. The provable character of the debt being thus determined, the creditor could not change the character of his claim in this respect by suing upon such a tort instead of suing upon the contract at the "foundation." That is all that the Crawford case decided upon that point. In logical effect however, it is an authority for the proposition that *a claim for damages, for fraud and deceit is not released because not provable unless it does have its origin in a valid contract.* That is our proposition.

Our claim is the damages sustained by reason of

fraud and deceit. The allegations of the complaint (page 1-4) and the decision (page 6) show that certain grossly false and fraudulent representations were made with intent to deceive and that they did deceive the plaintiffs to their injury and damage. The measure of damages was the value of the goods which were parted with, not by any means the amount of the price specified in the attempted contract made after the fraud had been perpetrated. The claim is of the same nature as it would have been if a third person had made the same representations with the same wilfully fraudulent intent and with the same injurious result. No one would say then that the third person when sued for damages for a fraudulent misrepresentation of the financial ability of Russell & Birkett could claim that all was "founded" upon or originated in a contract simply because an attempted contract was made by reason of the undiscovered falsity of his statements. The mere fact that the person who made the false representation and the one who made the supposed contract is one and the same can make no difference in principle. The two things are as separate as though the persons were. This alleged contract had only one purpose, viz: to enable Birkett to get away with the goods, to help carry out the fraud. It was one of the tools of his trade.

Again, to hold as was done in the Crawford case that a contract does not lose its provable chracter because a tort is committed in the performance of it is a long way from the proposition that all torts are provable under the implied contract which always exists and that they must be proven as such. That would be equivalent to a decision that all claims are provable. The attempt to classify them as provable and not provable would be altogether usless. Both sections of the Act under consideration would be utterly senseless. The

proposition here is the converse of that in the Crawford case. If there a provable debt did not lose its provability by reason of a fraud committed after the contract was made because the fraud was not the "origin or foundation," is it not reasonable to assert here that the fraud which was the "foundation" remains a tort throughout and does not change its character into a provable debt because a voidable contract was subsequently made in reliance upon it?

POINT II.

The qualifying clause "while acting as an officer or in any fiduciary capacity" found in Sec. 17, Sub. 4, of the act, relates to the word "defalcation" only and not to any of the preceding words, "fraud, embezzlement, misappropration."

These debts being created by fraud would not therefore be discharged. We are aware that this proposition is directly in conflict with the argument contained in the first branch of the case of Crawford vs. Burke. We desire to urge the point though because we believe that we can demonstrate its correctness and because we regard the disputed argument as a mere dictum in no way essential to the decision of the case before the court at the time the words were uttered and not therefore entitled to rank as a deliberate judicial decision.

The claim in the Crawford case was in no way "created by fraud" because as we have shown in point I the debt was created by a valid contract before any fraud was committed. The debt was of the kind which was held not to be fraudulent within the meaning of the act of 1867.

Hinnequin vs. Clews, 111 U. S. 565.

There are many reasons why the proposition stated at the head of this point is the true one. We will try to state some of them and at the same time answer the argument in Crawford vs. Burke.

1. The location of the commas is some though not conclusive evidence of the meaning of the sentence. While we would agree with the proposition that a matter of punctuation must give way to what would otherwise be the plain and forcible meaning of the statute as a whole, still it is of some value to see what the punctuation means. It should be followed unless there is some thing else which overcomes it. We do not know that anyone disputes the grammatical construction except the learned Supreme Court of Viriginia, neverless it may be wise at the outset to refer to a few standard text books upon the subject. We have collected all we can find and their testimony is emphatic:

"No comma must be placed between restrictive adjuncts or clauses and that which they restrict, as, 'The eye of Providence is constantly upon us.' "

Quackenbos' Course of Composition and Rhetoric Sect. 137.

"A restrictive clause, however, must be set off, by a comma, when it refers to several antecedents which are themselves seperated by that point; as, 'There are many painters, poets, and statesmen, whom chance has rendered famous rather than merit.' ".

Id. page 110.

"A restrictive clause should be preceded by a comma, if several words come between the relative pronoun and its antecedent.

If the relative pronoun refers to each of a series of

nouns, it should be separated from the series by a comma. Example, 'He had hopes, fears, and longings, which his friends could not share.' "

Lockwood's Lessons in English.

"No comma is inserted before or after conjunctions * * * such as, and, or, nor, but, yet * * * * * when employed to connect words belonging to the same part of speech and in the same construction; or to connect two expressions which are in the same construction, and are used as if they belonged to the same part of speech. A comma should, however, be inserted before a conjunction * * * * when the word after the conjuction is followed by an expression which qualifies that word alone. If the conjunction is repeated before each word or expression in the series the comma is usually omitted where the words between which the conjunction stands are closely united in meaning, and is sometimes inserted when they are not so united. If the series is composed of several words unconnected by conjunctions, a comma is put after the last word, in order to indicate that all the words in the series bear the same relation to the succeeding part of the sentence. If the succeeding part of the sentence is connected with the last word of the series, but not with the preceding words, the comma is omitted."

Hill's Principles of Rhetoric, page 257.

"Relative clauses which are merely explanatory of the antecedent, or which present an additional thought, are separated from the context by a comma, or commas, but relative clauses which are restrictive, that is, which limit or determine the meaning of the antecedent, are not so separated." Id. 263.

The sentence standing alone would clearly mean there

that the restrictive clause limits the word "defalcation" only and that any debt created by fraud is within the list of exceptions.

2. The court says in the opinion "Unless these words relate back to all the preceding words of the subdivision * * * * * it results that the exception in Sub. 2 of all Judgments for fraud is meaningless, since such judgments would be based upon a fraud excepted from discharge by Sub. 4, whether judgments had been obtained or not."

Well, here is where we think the mistake occured. There was a very good reason for the insertion of that sub-division and a very necessary one too. That reason was not mentioned in the opinion, nor argued in the briefs of either counsel. It appears to us to be too important to have been intentionally omitted from discusstion. We refer to the situation which confronted Congress when it came to pass the Act of 1898. Let us examine that for a moment.

Under the bankruptcy act of 1867 debts created by fraud or arising out of fiduciary relations and in tort generally, were not dischargable. In the highest courts of many of the states, as well as in many of the United States Circuit Courts, it was held that, if, prior to the bankruptcy, a judgment was obtained for the fraud, then the fraud and tort became merged into the judgment, a contract of record, and was released as a contract indebtedness.

The following is a list of such decisions. It is not complete by any means but is sufficient to show that the situation which confronted Congress in 1898 was a real one. There were, of course, many other decisions of a contrary import, but we believe that they

were at least less numerous whether less logical or not.

Wolcott vs. Hodges, 81 Mass. 547.
Ellis vs. Hays, 28 Me. 385.
Crouch vs. Gridley, 6 Hill 250.
Kellogg vs. Schuyler, 2 Denio, 73.
Blake vs. Biglow, 5 Ga. 437.
Comstock vs. Grout, 17 Vt. 512.
In re. Adson Comstock, 22 Vt. 642.
Manning vs. Keyes, 9 R. I. 224,
In re Wiggers, 2 Bliss, 71
In re Samuel Book, 3 McLean 317.
Hays vs. Ford, 55 Ind. 52.

We cannot find that the question was ever passed upon in this court. Under these cases a most peculiar and most unjust situation was presented. A person might be guilty of the grossest fraud or commit any other tort. He could not be discharged from his liability therefor, unless perchance a judgment should be recovered thereon, adjudging and declaring that the liability alleged really existed. The very minute that it became judicially determined that the fraud existed, it could be wiped out. So long as it was uncertain, the creditor was protected by special provision of the law. As soon as the creditor began to enforce his right so specifically protected, he might lose it by a discharge in bankruptcy. It is submitted that this is just the result which ought not to be. Now it has often been held, and by many courts, that where a legislative body adopts a statute from another jurisdiction, where it has received judicial construction, the re-enactment is made with reference to that judicial construction.

McDonald vs. Hovey, 110, U. S. 628,
Beebe vs. Griffing, 14 N. Y. 243,
Bellegarde vs. Union Bag & Paper Co. 90 App. Div. 577.

Upon the same principle it must be seen that Congress, when it came to pass the act of 1898, did so with the full knowledge of the judicial construction which the act of 1867 had received. They saw the injustice and the absurdity as well. They protected the creditor who had a judgment by the addition of subdivision 2, Sec. 17, putting him on the same basis as the other creditor whose cause of action had not been adjulicated.

That would seem to present a very good and natural reason for the presence of Sub. 2. It is also somewhat further elucidated by reference to Sec. 63a (1) where we find a judgment for what ever cause to be a provable debt. That provision was not in the previous acts. If it be borne in mind that a liability for fraud, injuries to property, &c., changed its character as well as its form when reduced to judgment, Sub. 2 of Sec. 17, was necessary to remove the incongruity judicially imposed upon the act of 1867 to save a judgment of any kind. Its presence does not explain or modify any other subdivision of section 17.

3. We also find in Section 63a, in subdivision 5, further convincing corroberative evidence that Congress intended to correct this situation and had full knowledge and understanding of this subject. Under the act of 1867, it was held that if the creditor could get his claim into judgment between the time of the filing of the petition and the date of the discharge, then the judgment could not be discharged, arguing upon the same theory that the debt which existed when the peition was filed, was not discharged because it was merged into the judgment subsequently obtained, a new and different debt, and that the judgment was not discharged, neither was it provable against the estate, because it did not exist when the petition was

filed. This sounds like an absurdity, but it was specifically held by many of the highest courts of the country.

Bradford vs. Rice, 102 Mass. 472.
Holbrook vs. Foss, 27 Me. 441.
Pike vs. McDonald, 32 Me. 418.

See also discussion and contrary decision N. Y Court of Appeals.

Monroe vs. Upton, 50 N. Y. 593, 597.

This was specifically, almost catagorically met by the insertion of subdivision 5 of Section 63a.

4. Further evidence that Congress knew the trouble about judgments is found in other subdivisions of Sec. 63a upon the subject of costs incurred in litigation prior to the filing of a petition.

5. We do not apprehend that the illustration used on page 192 of the Crawford opinion will be held to be an adjudication upon the nature of the claims in this case. It was used simply as an illustration by the learned Justice who wrote the opinion. All that can be said is that it is not an appropriate one and was used apparently without any very great consideration of the subject of the illustration in all its details. The danger that a creditor will try to harass his debtor by an attempt to claim that his contract debt is in reality a cause of action for fraud, is slight indeed when it is considered how many and how great iniquities may be fostered by the construction of the statute now asked for by our opponent. The reluctance of all courts and all juries to convict of fraud in its nature criminal, is a practical protection to the honest, but unfortunate

debtor, which is full and complete. The reasons which we have pointed out are so strong and conclusive that they must overcome any suggestion that such a fear as this must have guided Congress in its action.

With this situation in mind, it leaves us free to consider subdivision 4, sec. 17. Subdivision 2 is fully accounted for and the reason of its existence fully explained. It is a perfectly just and equitable reason too. It need not compel any unnatural construction of subdivision 4 in order to create a harmonious law as a whole. In fact, it adds force to the natural construction of subdivision 4.

The construction claimed to have been given by this court would leave the situation so that a debtor could defeat a claim for fraud by a petition in bankruptcy if filed before judgment. This would leave the same injustice which Congress sought to remove, only it would place the defrauded creditor without a judgment in the place where he was under the old act, after he obtained the judgment. In practical effect this would be a worse situation than the old one. In the nature of things some time must elapse between the perpetration of the fraud and the recovery of judgment. Often, usually, the fraud is not discovered until insolvency. A petition in bankruptcy can always be filled without much delay and thus nullify the saving clause about judgments. There may be instances where such would not be the history of the affair, but we believe that they must be very few in number as compared with those which would take the other course. This present anomaly was not overlooked, although the last one was. The act of 1898 evidently tried to cure the former one by subdivision two, Sec. 17. Where that purpose is understood it leaves us free to read sub-division four, Sec. 17, according to its grammatical construction. It does not need

to be harmonized with anything else. Perfect harmony already exists.

It is respectfully submitted, therefore, that the judgment of the Court of Appeals of the State of New York, and the judgment of the Supreme Court of that state rendered upon its remittitur, should be reversed and the judgment of the trial court affirmed.

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